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LOW TECH DESIGNS, INC.™  
"BRINGING TECHNOLOGY DOWN TO EARTH"™

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EX PARTE OR LATE FILED

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

February 24, 2000

Ex Parte Filing: Common Carrier Docket 92-105 (In the Matter of the Use of N11 Codes and Other Abbreviated Dialing Arrangements)

Dear Ms. Salas.

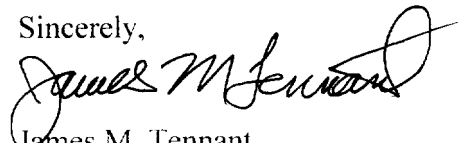
Mr. James M. Tennant, President of Low Tech Designs, Inc. (LTD), hereby files a copy of a document from an Illinois Commerce Commission proceeding (97-AB-001) to be included in the record of FCC Common Carrier Docket 92-105 (In the Matter of the Use of N11 Codes and Other Abbreviated Dialing Arrangements).

LTD has filed this document to show how state commissions have forced companies to disclose their plans regarding abbreviated dialing based services to their incumbent LEC competitors.

Unfortunately, the Hearing Examiner's Order requiring LTD to identify the services it planned to offer was issued verbally. This submitted document from Ameritech Illinois clearly shows, on pgs. 7-8 and n. 7, that LTD was required to disclose proprietary service plan information after it initially refused to do so.

Thank you for your assistance with this matter.

Sincerely,

  
James M. Tennant  
President

Copy to: David Ward, Senior Legal Advisor, FCC

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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

LOW TECH DESIGNS, INC. PETITION )  
FOR ARBITRATION PURSUANT TO SEC. )  
252(b) OF THE TELECOMMUNICATIONS )  
ACT OF 1996 TO ESTABLISH WHOLESALE )  
RATES AND AN INTERCONNECTION )  
AGREEMENT FOR ACCESS TO AND RATES )  
FOR UNBUNDLED NETWORK ELEMENTS )  
WITH ILLINOIS BELL TELEPHONE )  
COMPANY D/B/A AMERITECH ILLINOIS )

DOCKET NO. 97 AB-001

**AMERITECH ILLINOIS' REPLY IN  
SUPPORT OF MOTION TO DENY THE PETITION**

**[NON-PROPRIETARY VERSION]**

Illinois Bell Telephone Company ("Ameritech Illinois"), by its attorneys, respectfully submits this reply in support of its motion to deny the Petition for Arbitration to Establish an Interconnection Agreement ("Petition") filed by Low Tech Designs, Inc. ("LTD").

LTD's response to Ameritech Illinois' motion, although long, says very little that responds to the arguments set forth in the motion. Indeed, just the arguments that LTD fails to address compel denying the Petition, without even considering the additional arguments that LTD addresses inadequately.

**I. THE PETITION MUST BE DENIED BECAUSE LTD IS NOT A  
TELECOMMUNICATIONS CARRIER.**

Ameritech Illinois demonstrated in its motion that LTD's Petition must be denied because LTD is not a telecommunications carrier. (Motion, pp. 6-8.) Staff agrees, based upon the facts that (i) Ameritech Illinois' duties under the 1996 Telecommunications Act ("Act") run only to telecommunications carriers, and (ii) there is no record evidence to support the proposition that LTD is a telecommunications carrier. (Staff Response, pp. 2-5.)

That the Petition must be denied on this ground is even more clear now than it was when Staff reached its conclusion, because LTD's Response, which was LTD's last and best chance to try to show that it is a telecommunications carrier, makes no such showing. And the few things that LTD does say on this point only confirm that LTD's position is untenable:

- LTD recognizes that its Petition must be denied if it is not a telecommunications carrier, and nods to ¶ 992 of the First Report and Order, in which the FCC concluded that an entity "falls within the definition of 'telecommunications carrier'" under the Act only to the extent that it "is engaged in" (emphasis added) providing telecommunications for a fee. (LTD Response, p. 3.) Since LTD plainly is not engaged in providing telecommunications, LTD disparages the requirement by calling it "semantics" (id.), and then plays word games — saying that it is "engaged in" negotiations, and that LTD's President, Mr. Tennant, has been "engaged in" an industry forum (id.). It hardly needs saying that engagement in negotiations or a forum does not equate to engagement in the provision of telecommunications.

- LTD states that the FCC in ¶ 992 did not say "actively and currently providing for a fee" . . . but used a broader construction "to the extent a carrier is engaged in providing for a fee."

(Id.) Evidently, LTD believes that the FCC means what it says only if the FCC says the same thing in two or three different ways. It is sufficient, however, that the FCC unambiguously stated that an entity is a telecommunications carrier only to the extent

it "is engaged in" providing telecommunications. And LTD does not claim, and cannot claim, that it "is engaged in" providing telecommunications.

- Ironically, LTD takes Ameritech Illinois to task for "enter[ing] into negotiations" with LTD without demanding proof that LTD is a telecommunications carrier, and waiting until the arbitration to raise the issue. (LTD Response, pp. 2-3.) The irony, of course, is that LTD previously sought to take Ameritech Illinois to task for not negotiating with LTD. In any event, Ameritech Illinois' past willingness to talk with Mr. Tennant does not make LTD a telecommunications carrier.<sup>1/</sup>

- Finally, LTD notes that BellSouth, in its Answer and Motion to Dismiss LTD's arbitration petition in Georgia, stated that LTD is a telecommunications carrier. (Id., p. 4 and n.1.) BellSouth's purported statement cannot be used to cure LTD's utter failure to make any showing in this proceeding that it is a telecommunications carrier, for at least four reasons. First, nothing is known about the circumstances underlying the purported statement. For all the record shows, BellSouth simply decided to concede that LTD was a telecommunications carrier as a matter of convenience while it pressed its Motion to Dismiss LTD's petition on other grounds. Second, nothing is known about the facts (if any) on which BellSouth based its statement. If they were the same facts that are presented

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<sup>1/</sup> Generally, LTD's Response manifests an underlying confusion between having a good idea (which LTD believes it does) and having entitlements under the Act. It is that confusion that apparently led LTD to infer that it must be a telecommunications carrier if Ameritech Illinois was willing to talk with Mr. Tennant, and that also accounts for the extensive discussions in LTD's Response that have nothing to do with the present motion.

here, BellSouth's statement was simply wrong; if they were different facts — facts that would actually support a finding that LTD is a telecommunications carrier — LTD should have brought them to the attention of this Commission. Third, the purported BellSouth statement is not of record in this proceeding. And fourth, if LTD had submitted the purported BellSouth statement for the record, it would have had to be excluded as inadmissible hearsay.<sup>2/</sup> In short, it makes no difference what LTD says BellSouth said about LTD in an out-of-state arbitration under unknown circumstances and based on unknown facts. LTD has made no showing here that it is a telecommunications carrier.

Thus, just as Staff concluded — but all the more surely now that LTD has had, and could not take advantage of, a perfect opportunity to show otherwise — the Petition must be denied because LTD is not a telecommunications carrier.

**II. THE ISSUES SET FORTH BY LTD RELATE TO MATTERS THAT ARE NOT COVERED BY THE ACT.**

Ameritech Illinois demonstrated in its motion that the Petition must be denied for an additional reason: LTD is seeking neither interconnection as defined in the Act nor access to

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<sup>2/</sup> It is well settled that the "admissions" of non-parties, when offered as evidence against a party, are inadmissible hearsay. See, e.g., Rowe v. State Bank of Lombard, 247 Ill. App. 3d 686, 695-96, 617 N.E.2d 520, 527 (2d Dist. 1993); Taylor v. Checker Cab Co., 34 Ill. App. 3d 413, 419-20, 339 N.E.2d 769, 775 (1st Dist. 1975). While otherwise inadmissible evidence may be admitted in a Commission proceeding if it is of a type commonly relied on by reasonable prudent persons in the conduct of their affairs (83 Ill. Admin. Code § 200.610(b)), the purported BellSouth statement is not of such a type, for the reasons set forth in the text.

network elements for a purpose authorized by the Act. LTD's Response virtually concedes these points by ignoring them.<sup>3/</sup>

**A. LTD Is Not Seeking Interconnection  
"For Facilities And Equipment" or "For  
The Transmission And Routing Of Telephone  
Exchange Service And Exchange Access."**

Ameritech Illinois has demonstrated that LTD is not seeking "interconnection" as that term is used in Section 252(c)(2) of the Act, for two separate reasons: First, LTD is not seeking to interconnect "facilities and equipment." (Motion, pp. 3-4.) Second, interconnection "refers only to the physical linking of two networks for the mutual exchange of traffic" (First Report and Order, ¶ 176), and LTD does not seek to link a network to Ameritech Illinois' network and does not seek to exchange traffic with Ameritech Illinois. (Motion, p. 4.)<sup>4/</sup>

The Commission need not even address the first of those two points, because LTD concedes the second. There is not one word in LTD's Response that suggests that LTD seeks to interconnect networks, or to exchange traffic, or to interconnect for the transmission and routing of telephone exchange service and exchange access. This is not surprising, because LTD has (and will have) no network to link to Ameritech Illinois'; has no traffic to exchange; and does not (and will not) transmit and route telephone exchange service and

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<sup>3/</sup> Staff also does not address these points, having concluded that the Petition should be denied based on the "threshold issue" concerning the requirement that LTD must be a telecommunications carrier. (Staff Response, p. 2.)

<sup>4/</sup> Stated in the terms of Section 252(c)(2), LTD does not seek interconnection "for the transmission and routing of telephone exchange service and exchange access."

exchange access. Thus, LTD's Petition has nothing to do with interconnection under the Act, regardless whether software is considered "facilities and equipment."

If the Commission does address that question, it should conclude that software is not, as LTD contends, "equipment." LTD writes at some length about software, and the different types of software, and the importance of software (LTD Response, pp. 5-8), but never comes to grips with the one aspect of software that matters here: Interconnection must be for "facilities and equipment" (47 U.S.C. § 251(c)(2)), and the definition of "equipment" in the Act (47 U.S.C. § 3(50)) comports with the everyday understanding that software itself is not equipment, even though it may be included along with equipment when it is "integral to such equipment" (*id.*). LTD ignores this point.<sup>5/</sup>

**B. LTD Is Not Seeking Access To Network Elements "*For The Provision Of A Telecommunications Service.*"**

The Act requires incumbent LECs to provide requesting carriers with access to network elements only "for the provision of a telecommunications service." (47 U.S.C. § 251(c)(3).) In its Motion, Ameritech Illinois demonstrated that LTD was not seeking access to network elements for that purpose. (Motion, p. 5.) In response, LTD says that it seeks access to elements of Ameritech Illinois' network for the provision of telecommunications services. Characteristically, however, that is all LTD does — say it. LTD offers literally nothing to substantiate its assertion. (LTD Response, p 4.) This failure

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<sup>5/</sup> LTD also ignores that to qualify as equipment for purposes of interconnection, equipment must be "used by a carrier to provide telecommunications services." (47 U.S.C. § 3(50); see Motion, p. 3). As we show in the following section, LTD does not propose to provide telecommunications services.

is fatal, because a party must furnish more than conclusory assertions to survive a dispositive motion that challenges the legal and/or factual sufficiency of a complaint or petition.<sup>6/</sup>

As Ameritech Illinois pointed out in its motion, "telecommunications service" is defined in the Act:

Telecommunications service.--The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. (47 U.S.C. § 3(51)) (emphasis added).

Telecommunications.--The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received. (47 U.S.C. § 3(48)) (emphasis added).

Thus, what LTD proposes to provide is not a telecommunications service unless it is the offering of the transmission, between points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received — such as a phone call. The AIN-based "services" that are the subject of LTD's Petition do not do that.

LTD has identified some of the services it proposes to provide. (Response of Low Tech Designs, Inc. to Data Requests and Supplemental Data Request of Ameritech Illinois

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<sup>6/</sup> See, e.g., Account Servs. Corp. v. Dakcs Software Servs., Inc., 208 Ill. App. 3d 392, 399, 567 N.E.2d 381, 385 (1st Dist. 1990) ("[c]onclusory statements unsupported by sufficient allegations will not withstand a motion to dismiss"); Burghardt v. Remiyac, 207 Ill. App. 3d 402, 407, 565 N.E.2d 1049, 1053 (2d Dist. 1991) ("[a] mere conclusory assertion does not raise a question of fact"); In the Interest of E.L., 152 Ill. App. 3d 25, 31 504 N.E.2d 157, 161 (1st Dist. 1987) (litigant opposing a dispositive motion "must recite facts and not mere conclusions or statements based on information and belief").

(Att. 1 hereto), p. 4.)<sup>7/</sup> These services include [DESIGNATED PROPRIETARY AND CONFIDENTIAL BY LTD]

[END OF MATERIAL DESIGNATED PROPRIETY AND CONFIDENTIAL BY LTD] None of those services involves the transmission, between points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received. Thus, none of them is a telecommunications service. (See Verified Statement of Wayne Heinmiller, pp. 12-13.)<sup>8/</sup>

Ameritech Illinois explained clearly and simply in its motion (pp. 4-7) that the services LTD proposes to provide do not fall within the definition of "telecommunications services" in the Act. In its Response, LTD fails even to touch on the point; there is literally no mention of the definition of "telecommunications service" in the Act, and no attempt to

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<sup>7/</sup> LTD initially refused to identify the services it proposes to offer, but the Hearing Examiner required LTD to do so on February 21, 1997. It appears that LTD may have violated the Hearing Examiner's Order; if LTD's submission in response to the Order is taken as true, LTD identified only some of the services it proposes to offer. See Att. 1, p. 4 (stating that "services that would not normally be offered to consumers by traditional carriers, such as [several enumerated services] are just a few of the services LTD intends to offer . . . .") (emphasis added).

<sup>8/</sup> As Ameritech Illinois explained, the services that LTD proposes to provide are enhanced services. (See Motion, pp. 4-5.) Enhanced services are not telecommunications services, but rather are "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." (First Report and Order, FCC 97-51, CC Docket No. 92-105, p. 4 n.8 (Feb. 19, 1997) (citing 47 C.F.R. § 64.702(a).)

show that anything that LTD has in mind meets that definition. LTD's inability to address a key ground for Ameritech Illinois' motion speaks volumes.

Finally, if further confirmation that LTD does not propose to provide a "telecommunications service" were needed, it is notable that this is not the first time that LTD has come up empty when asked to back up its conclusory assertion that it plans to offer telecommunications services. Ameritech Illinois asked LTD, in Data Request 7, to "describe in detail how you intend to use such elements for LTD's provision of a 'telecommunications service,' as that term is defined in Section 3(51) of the Act." Attached hereto are LTD's response to Data Request 7 (Att. 2) and supplemental response to Data Request 7 (Att. 3). In those responses, LTD entirely ignores the question how it intends to provide a "telecommunications service" as that term is defined in the Act. The reason is evident: The services that LTD plans to provide are not telecommunications services.<sup>9/</sup>

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<sup>9/</sup> LTD's discussion of resale (LTD Response, p. 2) misses the point. The point that Ameritech Illinois made in its motion about resale was that the Petition does not concern resale, and therefore cannot be entertained on a theory that LTD is entitled to purchase from Ameritech Illinois for resale. (Motion, p. 2.) LTD does not contest this, and its observation that it is separately seeking or should be able to obtain services for resale is irrelevant.



CONCLUSION

For the foregoing reasons, and those set forth in Ameritech Illinois' Motion to Deny the Petition, Ameritech Illinois respectfully urges the Commission to deny LTD's request for arbitration.

Dated: March 4, 1997

Respectfully submitted,

AMERITECH ILLINOIS

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